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90-1395

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROBERT E. HARRELL and BARBARA J. HARRELL,
Petitioners,

v.

UNIROYAL-GOODRICH TIRE COMPANY,

Respondents.

PETITION OF ROBERT E. HARRELL
and BARBARA J. HARRELL

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioners, the Harrells, as lessors of real property, were deprived of their Constitutional rights to due process of law by the Court failing to recognize them as "persons" entitled to damages under the Robinson Patman Act?

2. Further, whether the Petitioners, the Harrells, were deprived of their Constitutional rights to due process of law and the right to a jury trial on the merits through dismissal of their claims by summary judgment where there exist undetermined issues of material facts?

LIST OF PARTIES TO THESE PROCEEDINGS

Petitioners herein are Robert E. Harrell and Barbara J. Harrell, who are individuals who leased real property to the Crawford Tire Company, a Pennsylvania Corporation, for use as business premises. Robert E. Harrell was, at the time of the events giving rise to this case, the sole shareholder of Crawford Tire Company, Incorporated. The Petitioners (Harrells) assert their claims in this case against the Respondent Uniroyal-Goodrich Tire Company as a result of having dealt directly with the Respondent, and not as a third-party beneficiary of obligations of Uniroyal-Goodrich to Crawford Tire Company Incorporated. The only parties to these proceedings are Robert E. Harrell and Barbara J. Harrell as Petitioners, and Uniroyal-Goodrich Tire Company as Respondent. All claims of the other parties, being Crawford Tire Company, Incorporated, Pace Membership Warehouse, Inc. and Tire America have been settled and they are no longer involved in this Petition or appeal.

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PACE MEMBERSHIP WAREHOUSE, INC.
and TIRE AMERICA,
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PETITION OF ROBERT E. HARRELL
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REFERENCE TO REPORTS OF LOWER COURT OPINIONS

The Order and Memorandum Opinion of the United States District Court for the Western District of Pennsylvania which granted summary judgment against the Petitioners, dismissed the Petitioners' leave to amend

their complaint, and dismissed the pendant state claims, were entered on April 2, 1990, and are attached hereto as Appendix C. The Judgment and Memorandum Opinion of the United States Court of Appeals for the Third Circuit which affirmed the Judgment of the District Court were entered on December 5, 1990, and are attached hereto as Appendix B. Neither of these decisions has been reported.

STATEMENT OF THE GROUNDS FOR SUPREME COURT JURISDICTION

The Judgment of the Third Circuit Court of Appeals (App. B) was entered on December 5, 1990. This Petition is filed within 90 days of that date. This Court has jurisdiction to review the judgment in question by writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

The Constitutional provisions involved here are the fifth and seventh amendments to the Constitution of the United States. The statutes are 15 U.S.C. §§ 13(a), 15 and 26. These are set out verbatim in Appendix A.

BASIS OF INITIAL FEDERAL JURISDICTION OF THE LOWER COURT

The Third Circuit Court of Appeals exercised subject matter jurisdiction over this matter being an appeal from a final order and judgment of the United States District Court for the Western District of Pennsylvania in accordance with 28 U.S.C. § 1291, upon a case brought pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, 28 U.S.C. § 1331, diversity jurisdiction under 28 U.S.C. § 1332, and pendant jurisdiction of a state claim.

STATEMENT OF THE CASE

Crawford Tire Company was a Pennsylvania corporation engaged in the retail tire business, whose sole shareholder was Robert E. Harrell, one of the Petitioners herein. Robert E. Harrell and Barbara J. Harrell, as individuals, leased business premises to Crawford. Both Crawford and the Harrells brought suit against Uniroyal-Goodrich (a tire manufacturer and wholesaler) and against two retail tire dealers, Pace Membership Warehouse, Inc. and Tire America, Inc.[1]

Crawford operated a commercial retail tire sales and service business in suburban Pittsburgh, Pennsylvania, from about 1957 until the corporation was dissolved in bankruptcy in 1990.[2]

Robert E. Harrell had acquired Crawford in 1974, when he became its sole shareholder, principal officer and an employee. Robert E. Harrell and Barbara J. Harrell owned a commercial building which they modified for the specific purpose of retail sales and service of tires and which they leased to Crawford for Crawford's business premises.

Sometime prior to 1960, Crawford entered a continuing business relationship with Goodrich Tire

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1. All claims by Crawford Tire Company against all of the named Respondents (Uniroyal-Goodrich, Pace Membership Warehouse, Inc. and Tire America, Inc.) and all claims by the Petitioners (Harrells) against two of these Respondents (Pace Membership Warehouse, Inc. and Tire America, Inc.) have been settled and dismissed, and those claims are not involved in this Petition. The only claims left are those of Robert E. Harrell and Barbara J. Harrell as individuals against Uniroyal-Goodrich for price discrimination and fraud.

2. Crawford Tire Company filed a petition for liquidation under Chapter 7 of the Bankruptcy Code on September 15, 1987 at Number 87-02518 in the U.S. Bankruptcy Court for the Western District of Pennsylvania. An order was entered approving the final account and distribution in this bankruptcy case on February 20, 1990.

Company,[3] a manufacturer and wholesale distributor, which provided Crawford with an exclusive sales territory and technical sales and assistance in exchange for Crawford's promoting the sales of Goodrich tires.

Beginning in 1979, during the course of this business relationship, the Harrells suffered damages and loss of income as lessors of Crawford's business premises as a result of Uniroyal-Goodrich having charged Crawford more than it charged other purchasers for the same tires, and by favoring other purchasers over Crawford through discounts not afforded to Crawford. Harrells also allege that they were injured when Uniroyal-Goodrich induced Crawford to promote and to sell Uniroyal-Goodrich tires through false and fraudulant representations.

Petitioners (Harrells) claim that Uniroyal-Goodrich discriminated against Crawford in violation of the Robinson Patman Act[4] by selling tires to Crawford at prices higher than charged to Crawford's competitors. Harrells claim they were victims of this price discrimination, and that they have standing to sue Uniroyal-Goodrich, because they have been financially harmed as lessors of business premises they leased to Crawford Tire Company. Harrells further assert claims that they were defrauded by Uniroyal-Goodrich in being wrongfully induced to construct and to modify Crawford's business premises.

About 1981, Uniroyal-Goodrich requested Harrells, as individuals, to expand and modernize Crawford's warehouse and sales outlet. Uniroyal-Goodrich represented that such an enhanced commercial facility would, for various reasons, insure the Harrells and Crawford substantial long-term profitability. Harrells relied on these misrepresentations and they invested funds in the building leased to Crawford, which funds

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3. Goodrich Tire Company merged with Uniroyal Tire Company to form Uniroyal-Goodrich, the Respondent, about 1986.

4. 15 U.S.C. § 13(a).

were never recovered because Uniroyal-Goodrich favored other purchasers.

Harrells also allege that, beginning about 1984, Uniroyal-Goodrich commenced a deliberate pattern of price discrimination against Crawford which ultimately forced Crawford into bankruptcy. Harrells further claim that Uniroyal-Goodrich failed to perform their promises and representations made to the Harrells concerning the business premises, and Harrells lost income and profits from the forced sale of the building in the bankruptcy.

Following a settlement and dismissal of all claims in the case except those of the Harrells against Uniroyal-Goodrich, the District Court granted summary judgment[5] against the Harrells, finding that the Harrells lacked standing as lessors to maintain an action under the Robinson Patman Act, and that the fraudulant representations, if any, would have been made by Uniroyal-Goodrich to Crawford Tire, the corporate entity, rather than to the Harrells as individuals and lessors of Crawford's business premises.

The Harrells, as indiviuals, appealed the summary dismissal by the District Court to the Third Circuit Court of Appeals. The Third Circuit affirmed the judgment of the District Court, and this appeal to the United States Supreme Court followed.

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5. Harrells had filed a motion for leave to amend their original complaint to assert a more specific fraud claim against Uniroyal-Goodrich. The District Court, in granting summary judgment, dismissed the Harrells' original complaint for fraud, and denied the Harrells' motion to amend this original complaint.

ARGUMENT FOR ALLOWANCE OF THIS WRIT

1. The Harrells, Petitioners, have standing under the Robinson Patman Act and they are "persons" as lessors of the business premises to maintain an action for price discrimination by Uniroyal-Goodrich against Crawford Tire Company, their lessee.

The antitrust violations by Uniroyal-Goodrich against Crawford Tire caused economic harm to the Harrells as Crawford's landlord. The Harrells, as lessors of Crawford's business premises, were directly and proximately injured by the Respondent's antitrust violations. The Harrells are proper parties as landlords to assert the antitrust violations by Uniroyal-Goodrich, and Harrells' damages are readily computed and do not duplicate the damages of Crawford Tire Company or of any one else. Therefore, the Harrells have standing in this matter.

The Robinson, Patman Act prohibits sellers from discriminating in pricing between different purchasers of a product in order to give one a competitive advantage. The language of Section 4 of the Clayton Act defines a broad class of persons who may bring a private action for treble damages under the antitrust laws. The Act provides:

> "(a) It shall be unlawful for any person engaged in commerce, ... either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, ... where the effect of such discrimination may be to substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ."

§ 2 of the Clayton Act, 38 Stat 730, as ammended, 49 Stat 1526, 15 U.S.C. § 13, 15.

Acknowledging the limitations of the breadth and scope of the Act, and recognizing that the Act must be subject to reasonable balancing between business interests and the public trust, this Third Circuit Court of Appeals has stated unequivocally that compensation of victims insures the deterrence of antitrust violations in stating:

> "Section 4 of the Clayton Act provides a treble damage remedy to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C.A. § 15 (West Supp. 1983). On its face section 4 is written very broadly. If read literally it is expansive enough to encompass any injury that could be attributed directly or indirectly to the consequences of an antitrust violation. The Supreme Court has held, however, "that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that may conceivably be traced to an antitrust violation." *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 907, 74 L.Ed.2d 723 (1983) (quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263 n. 14, 92 S.Ct. 885, 891, 31 L.Ed. 2d 184 (1972). Rather section 4 claims must be considered in light of the statutory purposes behind the awarding of treble damages: to deter antitrust violators and deprive them of "the fruits of their illegality," and to compensate victims of antitrust violations for their injuries. *Pfizer Inc. v. Government of India*, 434 U.S. 308, 314, 98 S.Ct. 584, 588, 54 L.Ed. 2d 563 (1978)
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> * * * *
>
> Only by the careful application of those principles to the multitude of claims that potentially are swept within the scope of section 4 can courts properly effectuate Congress' antitrust policies of deterring

> antitrust violators and compensating victims of anti-competitive behavior"

Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958, 962-65 (3rd Cir. 1983).

The U.S. Supreme Court has further stated that the purpose and scope of the Robinson Patman Act was and is to protect small business persons, such as the Harrells are in this case, from the affects of discrimination. *FTC v. Meyer*, 390 U.S. 341 (1968).

The economic injury to the Harrells was a direct and proximate result of the antitrust violations of Uniroyal-Goodrich. The price and non-price discrimination by Uniroyal-Goodrich forced Crawford Tire out of business and left the Harrells with no income from the Crawford lease, and with no prospect of any other lease which necessitated the forced sale of the business property. This is not a case where there exists only some vaguely-defined link between the Harrells and Crawford with respect to the economic injury, but a clearly defined and direct result of the harm to Crawford.

In this case, Robert E. Harrell and his wife Barbara J. Harrell jointly owned and leased the business premises from which Crawford Tire Company, a separate corporation, operated its tire dealership. Uniroyal-Goodrich, through its antitrust violations, forced Crawford into bankruptcy. As a direct result of Crawford's failure, the Harrells were unable to lease this special-purpose building to another business, and the Harrells were forced to sell the building at a substantial loss.

This case is not distinguishable from that of *Perkins v. Standard Oil Corp.*, 395 U.S. 642 (1969). In *Perkins*, the U.S. Supreme Court held that landlords may recover for injuries caused by discrimination to their business tenants. Perkins sued Standard Oil under the Robinson Patman Act for price discrimination, the same claim made by the Harrels in this case. Perkins owned both the buildings, which he leased to the service stations, which he also owned and operated. The service stations

paid rent to Perkins for the buildings. The Court ruled that Perkins could recover all his damages, including lost rents from the service stations, because he was the principal victim, even though the impact of the discriminatory prices was on the service stations. *Perkins*, 395 U.S. at 649-50. The Harrells are the principal victims of the discrimination against Crawford, therefore they have standing to sue Uniroyal-Goodrich.

The opinion of the District (lower) Court in *Perkins* found that the landlord's damages were not proximately caused by Standard Oil's violation of the Robinson Patman Act against the tenant. The Supreme Court concluded that the District Court, and the Court of Appeals, were in error in failing to allow the landlord's damages to be recovered where the tenant was the victim of price discrimination. The Supreme Court stated that:

> "One other minor group of damages was found to be improper by the Court of Appeals and we conclude that this ruling was also erroneous. Perkins submitted some evidence tending to show that he as an individual had suffered financial losses because the two failing Perkins corporations (Perkins of Washington and Perkins of Oregon) were unable to pay him agreed brokerage fees for securing gasoline, rental on leases of service stations, and other indebtedness. The Court of Appeals, in order to give guidance to the trial judge at the proposed new trial, noted that, in its opinion, these damages were not proximately caused by Standard's violations and that Perkins should not recover for these damages in a second trial. For this proposition the Court of Appeals cited *Karseal Corp. v. Richfield Oil Corp.*, 221 F2d 358, 363, which held that "the rule is that one who is only *incidentally* injured by a violation of the antitrust laws, —the bystander who was hit but not aimed at, —cannot recover against the violator." It is clear in this case, however, that Perkins was no

> innocent bystander; he was the principal victim of the price discrimination practiced by Standard. Since he was directly injured and was clearly entitled to bring this suit, he was entitled to present evidence of all his losses to the jury."

Perkins v. Standard Oil Corp., 395 U.S. 642, 649 (1969).

Appellants concede that there must be reasonable limitations intended by the legislature and, indeed, those interpreted by the courts. Issues have been raised and determined at various times whether extending the scope of the intended victims of economic discrimination through "duplicate" damages, victims whose damages are too difficult to calculate, and victims who are too remote or where there is no proximate causal relationship, i. e., legal cause, as a matter of public policy.

The Supreme Court obviously recognized that these would be issues to be determined on a case-by-case basis, and that they would not be simple to determine. Associate Justice Marshall, in his separate opinion in *Perkins* observed that:

> "The law under the Robinson Patman Act is convoluted enough without the addition of numerous explicit and implicit holdings which may come back to bedevil us in future years."

Perkins v Standard Oil Corp., supra, at 652.

The issue of assessing duplicative damages was analyzed in this Third Circuit in *Gregory Marketing Corp. v. Wakefern Food Corp.*, 787 F.2d 92, (3rd Cir.), cert. den., 479 U.S. 821 (1986). This Third Circuit case cited the Supreme Court's statement concerning duplicate recoveries in the case of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which observed that:

> "The [Supreme] Court ruled that an indirect purchaser in a chain of distribution may not maintain a damage action against a seller for overcharges in violation of the Sherman Act passed on by the direct

> purchaser. Allowing every person along a chain of distribution to claim damages for a single transaction would risk duplicative recoveries. . . . Accordingly, the Court reasoned, to allow such suits would be "inconsistent with the broader remedial purpose of the antitrust laws." (Citation omitted)

Gregory, supra., at 94.

The *Gregory* Court was concerned that there was a risk of "multiple treble damage recovery" and cases may become too difficult to try because of "complex damage theories". This may be the case where, as in Gregory, we are concerned with the situation involving purchasers in a chain of distribution. The Harrells are not in that position. The Harrells are in the same position as *Perkins*, that is they are lessors of business property; they are not involved in a stream of commerce trading in commodities, therefore their damages are not subject to duplication.

The issue of duplicate damages was also discussed in *Merican, Inc. v. Caterpillar Tractor Co.*, supra, at 963-64, where the Court expressed the fear that the damages issue would involve massive evidence and complicated theories. The instant case involving the Harrells' lease presents no such problem. The Harrells damages, as landlords, were their lost rent and the lost value of the building (the difference between its value as a retail tire establishment, the purpose for which it was specifically designed, and its value as a general purpose retail or commercial establishment). These damages do not duplicate those of the only other victim, being Crawford Tire Company. Crawford's lost profits damages would treat the rent as a cost of doing business, which would be a reduction in profits to Crawford. Since Harrells owned the building, Crawford's damages would not duplicate Harrells' claim for the lost value of the building.

Similarly, any concerns that damages to persons in the position of Harrells, as lessors, being complex and

difficult to compute are groundless. The rent was fixed by the terms of the lease. The value of the building as determined by the length of the lease and the rental rate is certain. The particular problems in valuing damages in the *Illinois Brick* case would not be present in this case.

Petitioners further concede that there are limits as to whether a claimant may be too remote from the violation that, as a matter of policy, certain claims should be disallowed. This line, however, appears to be difficult to describe. Consider the guidance of the Supreme Court in this respect:

> "An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable. [*Illinois Brick Co. v. Illinois*, 431 U.S. 720, 760, (Brennan, J., Dissenting). It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 476-477 (1982).

Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983)

Petitioners do not dispute that, as an economic "fact-of-life", a financial set-back to one or another individual or business owner affects many others to some degree financially. The out-of-work mechanic buys less from the baker, who may then be unable to purchase clothing from the tailor, *ad-infinitum*. The question is, therefore, whether the financial harm along the economic path is speculative and remote, or is it positive and certain.

The Harrells, as lessors of the victim's business premises, are directly in line at the first and immediate level of harm of persons intended to be protected by the

antitrust laws. There is no more direct victim except for Crawford itself. Harrells are directly within the area of the economy endangered by the breakdown of competitive conditions. The Harrells are not merely tangentially related to an antitrust violation. They are not ripples on the outer perimiter of the circle of of the violation. They are the epicenter.

The Harrells therefore have standing and are proper parties to maintain their suit under the Robinson Patman Act. The intent of the Act is to protect individuals such as the Harrells who are directly harmed by a violation of the Act. The Harrells' claims are not duplicated by any other claims of Crawford Tire Company and they are certain and not difficult to compute.

II. The Harrells, Petitioners, were deprived of their right to due process of law and a hearing on the merits of their claims where the lower court improvidently entored summary judgment where factual issues exist which were not determined.

The District Court below entered summary judgment in favor of Uniroyal-Goodrich and against the Petitioners Robert E. Harrell and Barbara J. Harrell, individuals, for two reasons. It appears that the first reason is purely legal and the second being factual. The District Court opined that, first, the Harrells as individual lessors have no standing to sue since they are not proper parties to bring an action here under the Robinson Patman Act. The second reason for entering summary judgment, and as to the factual matter, the District Court concluded that, after having reviewed the record, there can be no reasonable conclusion other than that the misrepresentations made by Uniroyal-Goodrich were made not to the Harrells as individuals, but to them or either one of them as an officer, agent or employee of Crawford Tire Company.

As to the propriety of the District Court having entered a final, complete summary judgment (as opposed to a partial summary judgment) these two reasons are not mutually dependent. They are separate and distinct considerations. If the District Court's judgment is reversed for either reason, this case must be remanded for trial.

Petitioners' rationale in this assertion is that, should this Court conclude that the Harrells have standing as the lessors of business premises whose lessee is a victim of price discrimination, it is irrevevant whether the Harrells were subject to common law fraud. Should this Court conclude that there is an issue of fact whether the Harrells were defrauded by Uniroyal-Goodrich, it is irrelevant whether their action under the Robinson Patman Act is dismissed for want of standing.

Although the same element, fraud, is contained in both the statutory (Robinson Patman) and the common law causes of action, the factual issue of misrepresentations in the statutory action concern whether or not they were actually made, and as to the common law action, the issue is *to whom* were they made.

Further the issue of pendent jurisdiction, wherein the District Court finds that, since the Robinson Patman claim was dismissed, there is no federal case to which the common law fraud action may attach, would be moot since the Harrells have stated in their complaint diversity of citizenship exists between them and Uniroyal-Goodrich, and their action would be maintained under Title 28 U.S.C. § 1332. The Harrells also assert that their complaint under the common law fraud action would be amended to state a claim in excess of $50,000.00 for federal jurisdiction.

Rule 56 of the Federal Rules of Civil Procedure provides the procedural framework within which the District Court determines the propriety of entering summary judgment.

Rule 56(b) applies to a summary judgment requested by a defendant:

"(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declatory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof."

F.R.C.P. Rule 56(b).

The Rule provides when judgment may be entered:

". . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . . ."

F.R.C.P. Rule 56(c).

The Rule provides for the moving party to file affidavits to support a summary judgment motion, which affidavits may be opposed by the non-moving party:

". . . When a motion for summary judgment is made *and supported as provided in this rule*, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, *if appropriate*, shall be entered against the adverse party." (emphasis supplied)

F. R. C. P. Rule 56(e).

Although there is no absolute requirement that the defending (moving) party file an affidavit attesting that no issue of fact exists in the case, in a case such as this where there are no pleadings, depositions, answers to interrogatories or admissions which establish that no

genuine issue exists, the defending party's motion cannot be supported without an affidavit, and such party is certainly not entitled to summary judgment.

In this motion presently under consideration, neither party filed any affidavit or affidavits in support of or in opposition to summary judgment. Since Rule 56 contemplates the defending party to file an affidavit, if it can, to show that there is *no* issue of fact in the case, and where the pleadings and the record similarly fail to demonstrate that there is *no* issue of fact, that party certainly is not entitled to summary judgment.

In filing their amended complaint, the Harrells clearly established the existence of issues of material facts. These facts are explicitly set forth in the amended complaint.

If the Defendant Uniroyal-Goodrich were able to controvert these facts, it certainly would have done so by filing an affidavit in support of its motion. Since such affidavit was not filed, it must be presumed that these are genuine issues to be determined by a finder of fact at the trial of this matter, and the Court abused its discretion in granting summary judgment in this circumstance.

The existance of a genuine factual dispute which is material to the outcome of the case between the parties will defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-249 (1986). The moving party is held to a strict standard and has the burden of proof that there exists in the record no genuine issue as to any material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 151 (1970); *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 848 (3d Cir. 1974).

Furthermore, when the facts are unclear, any doubt as to the existance of a genuine issue of material fact will be resolved *against* the party moving for summary judgment. *Smith v. Pittsburgh Gage & Supply*, 464 F.2d 870 (3d Cir. 1972).

The case here presently before this Court, even if not perfectly clear whether summary judgment should be granted or denied, certainly must be resolved *against* granting summary judgment.

CONCLUSION

The Harrells, Appellants, have standing under the Robinson Patman Act as lessors of the Crawford Tire Company business premises to maintain an action for price discrimination by Uniroyal-Goodrich against Crawford Tire Company.

The Harrells were victims directly affected by the unlawful price discrimination of Uniroyal-Goodrich against Crawford Tire Company. The Harrells invested in Crawford's commercial warehouse and sales outlet under the reasonable and justifiable belief that Uniroyal-Goodrich would not discriminate against Crawford, their lessee, in their business relationship. Harrells are therefore proper parties under the Robinson Patman Act to sue for a violation of the Act. Further, the damages may be readily calculated as a sum certain, and these damages are not duplicated by any claim of Crawford Tire Company against Uniroyal-Goodrich.

There are genuine issues of material fact and law on the record which precludes the court from entering summary judgment as a matter of law.

Federal Rule of Civil Procedure Rule 56 allows summary judgment to be granted only in a clear case free from doubt and only where the record clearly establishes or shows there is no genuine issue for trial.

The record in this case clearly establishes that there is a genuine issue of fact whether Uniroyal-Goodrich defrauded Robert E. Harrell or Barbara J. Harrell, or either of them, by making false and fradulant representations to induce the Harrells to invest in Crawford Tire's business property when Uniroyal-Goodrich knew, or should have known, that Crawford would become insolvent as a seller of Uniroyal-Goodrich tires.

For the above and foregoing reasons, the Petitioners respectfully request that this Court issue its Writ of Certiorari to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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March 5, 1991

APPENDIX

Appendix A — Constitutional and Statutory Provisions Involved.

Amendment V to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VII to the United States constitution provides as follows:

> In Suits at common law "where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law,

Section 2 of the Clayton Act, 15 U.S.C. § 13, provides as follows:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the

jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them:

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides as follows:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 16 of the Clayton Act, 15 U.S.C. § 26, provides as follows:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, In any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this act [§§ 13, 14, 18, and 19 of this title], when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue:

Appendix B — Judgment and Opinion of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-3273

CRAWFORD TIRE COMPANY
ROBERT E. HARRELL
BARBARA J. HARRELL

v.

UNIROYAL GOODRICH TIRE COMPANY
PACE MEMBERSHIP WAREHOUSE INC.
TIRE AMERICA

ROBERT HARRELL and BARBARA HARRELL,
Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 87-00790)
District Judge: Hon. William L. Standish

Before: BECKER and NYGAARD, *Circuit Judges*, and POLLAK, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District

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* Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

of Pennsylvania and was submitted under Third Circuit Rule 12(6) on November 27, 1990.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court entered April 2, 1990 be, and the same is hereby affirmed.

Costs taxed against appellants.

ATTEST:

Clerk

DATED: DEC 5 1990

Costs taxed in favor of Appellee as follows:

Brief	$78.90
Appendix	5.40
Total	$84.30

Certified as a true copy and issued in lieu of a formal mandate on December 27, 1990.

Test:

Deputy Clerk,
U.S. Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-3273

CRAWFORD TIRE COMPANY
ROBERT E. HARRELL
BARBARA J. HARRELL

v.

UNIROYAL GOODRICH TIRE COMPANY
PACE MEMBERSHIP WAREHOUSE INC.
TIRE AMERICA

ROBERT HARRELL and BARBARA HARRELL,
Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 87-00790)
District Judge: Hon. William L. Standish

Submitted Under Third Circuit Rule 12(6)
On November 27, 1990

Before: BECKER and NYGAARD, *Circuit Judges*, and POLLAK, *District Judge*[*]

(Opinion Filed: December 5, 1990)

MEMORANDUM OPINION

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[*] Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

NYGAARD, *Circuit Judge*

This appeal is from a summary judgment against the plaintiff in a private suit under the Robinson Patman Antitrust Act. Crawford Tire Company, a retail tire dealership, and Robert and Barbara Harrell filed this antitrust claim against Uniroyal-Goodrich Tire Company, alleging that UGTC had discriminated against Crawford in violation of the Robinson Patman Act by selling tires to Crawford at a price higher than it sold them to certain of Crawford's competitors. While the suit was pending, Crawford filed a petition in bankruptcy. Crawford's trustee settled Crawford's claim against UGTC and the settlement was approved by the bankruptcy court. The district court dismissed all of Crawford's claims against UGTC with prejudice. The only remaining claims were those of the Harrells. Robert Harrell was the operator, owner, and sole shareholder of Crawford, and both Robert and Barbara Harrell were the owners of the premises leased to Crawford Tire Company.

The district court granted summary judgment in favor of UGTC on the Robinson Patman Act claims and dismissed the pendent state law fraud claims. We will affirm.

I.

The district court granted summary judgment on the Robinson Patman Act claim because it concluded that the Harrells did not have standing either as landlords or sole shareholders of Crawford to assert antitrust claims against UGTC. We exercise plenary review of this legal question. *Erie Telecommunications, Inc. v. City of Erie*, 853 F.2d 1084, 1093 (3d Cir. 1988). At issue is whether lessor-owners of real estate who are entitled to rental payments from the victim of price discrimination are "person[s] . . . injured in his business or property" within the meaning of Section 4 of the Clayton Act, 15 U.S.C. § 15 (defining the class of persons who may bring private antitrust actions).

We previously concluded that they are not. In *Melrose Realty Company v. Loews, Incorporated*, 234 F.2d 518, 519 (3d Cir. 1956) we decided "recovery is denied the lessor on the ground that it does not possess a property interest cognizable under Section 4 and that the injury to the lessor's property right is too "remote to give is *locus standi*." Before that, in *Harrison v. Paramount Pictures*, 115 F.Supp. 312, aff'd per curiam 211 F.2d 405 (3d Cir. 1954) the plaintiff, like the Harrells, claimed the antitrust injury to her tenant adversely affected the amount of rent she received. We held the injury to be too remote and indirect.

We see nothing in the facts of this case to distinguish it from these cases so as to bring this landlord into the definition of "person," unless the Supreme Court's decision in *Perkins v. Standard Oil Company of California*, 89 S.Ct. 1871 (1969) requires it. Perkins was an individual who brought a civil antitrust action against Standard Oil of California seeking treble damages for injuries he allegedly sustained from Standard Oil's price discrimination. Perkins, like Harrell, was a landlord and did indeed suffer losses from uncollected rentals on service station leases. But there the similarity ends. He was also a wholesaler, operated storage tanks and trucking equipment, and a retailer through his own Perkins Gas Stations. He filed his action not as a landlord having sustained indirect injuries, but as an individual who was himself a direct victim of price discrimination. The Supreme Court allowed his recovery, not because he was a landlord, but because "he was the principal victim of the price discrimination practice by Standard," and "[s]ince he was directly injured and was clearly entitled to bring this suit, he was entitled to present evidence of all his losses to the jury." *Perkins* at 1875. Here, it is Crawford who is primarily injured by UGTC. Crawford filed suit and its trustee settled its claims against UGTC. Theoretically, any settlement it recovered should have enabled it to pay the rent due the Harrells. That it did not does not give the Harrells an independent cause of

action to allege the same price discrimination and to recover for injuries tangentially caused them by Crawford's economic demise.

We find nothing in *Perkins* that entitles the appellant to relief. In *Harrison* at 406, we found ourselves in complete accord with the reasoning of the district judge who concluded that "each case must be dealt with on its own facts." Under these facts, we hold that Harrell, as a landlord, is not a "person" and not entitled to recover under the Act.

II.

The appellants also contend that the district court erred by dismissing their pendent state law fraud claims. It is within the discretion of the district court whether to retain jurisdiction over the pendent claim or to dismiss it for lack of subject matter jurisdiction. *Carnegie Mellon University, et al v. Cohill, Judge, U.S. District Court for the W.D. of Pa., et al*, 484 U.S. 343 (1988). The appellants can point to no abuse of the court's discretion, and we find none.

They also contend that it was error for the court to refuse their request to amend the complaint to allege diversity jurisdiction under 28 U.S.C. § 1332. We review the district court's decision only for an abuse of discretion. *Kaiser v. General Electric Corp.*, 831 F.2d 423, 426 (3d Cir. 1987). "Great liberality in allowing amendment of an initial pleading is often appropriate, especially when an amendment will further the ends of justice, effectuate presentation of the suit's merits and not prejudice the opposing party." *Kaiser* at 427. Likewise the Federal Rules of Civil Procedure provide that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). But here no one will suffer injustice by the court's order. Appellants fail to specify any fraudulent statement made by UGTC to them as individuals. It is abundantly clear from the amended

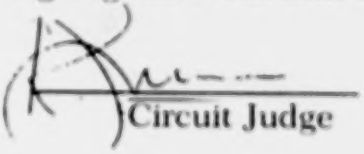
complaint that appellants are alleging antitrust violations and fraud by UGTC upon Crawford and the business, not upon them as landlords. We find the district court's order denying appellants' motion to amend their complaint to be a proper exercise of its discretion.

IV.

For these reasons we will affirm the summary judgment of the district court.

TO THE CLERK:

Please file the foregoing memorandum opinion.



Circuit Judge

Appendix C — Judgment and Opinion of the United States District Court for the Western District of Pennsylvania.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CRAWFORD TIRE COMPANY, et al., *Plaintiffs*,	)	
v.	)	Civil Action No. 87-790
UNIROYAL GOODRICH TIRE COMPANY, et al., *Defendants*,	)	

ORDER

And now, this 2nd day of April, 1990, in accordance with the foregoing memorandum, it is hereby ORDERED as follows:

1. The motion of defendant, Uniroyal Goodrich Tire Company (UGTC) for summary judgment on the claims asserted against it by plaintiffs, Robert Harrell and Barbara Harrell (the Harrells) under the Robinson-Patman Act, 15 U.S.C. § 15, is hereby granted. Summary judgment shall be entered in favor of UGTC and against the Harrells as to that claim.

2. The state law claim of fraudulent misrepresentation by the plaintiff Harrells and against defendant UGTC, of which the court had pendent jurisdiction during the pendency of the Robinson-Patman claim, is hereby dismissed for lack of subject matter jurisdiction.

3. The motion of the Harrell plaintiffs for leave to amend their complaint to assert, under 28 U.S.C. § 1332, this court's diversity jurisdiction of their state law fraudulent misrepresentation claim against defendant UGTC is denied.

William L. Standish
United States District Judge

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CRAWFORD TIRE COMPANY, et al., *Plaintiffs*,	)	
v.	)	Civil Action No. 87-790
UNIROYAL GOODRICH TIRE COMPANY, et al., *Defendants*,	)	

MEMORANDUM

I

Presently before the court is the motion of defendant Uniroyal Goodrich Tire Company (UGTC) for judgment on the pleadings or for summary judgment against plaintiffs Robert and Barbara Harrell (the Harrells).[1] Defendant asserts that plaintiffs lack standing to maintain an antitrust claim under the Robinson-Patman Act, 15 U.S.C. § 15. Also on behalf of defendant is a motion to dismiss plaintiffs' common law fraud claims. Pending before the court on behalf of plaintiffs is their motion for leave to amend their complaint. After argument and consideration of the motions and briefs filed in this matter, for the reasons that follow, defendant's motions for summary judgment and dismissal of the complaint shall be granted, and plaintiffs' motion for leave to amend their complaint shall be denied.

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1. Subsequent to the filing of the motions and oral argument, plaintiffs filed a stipulation of dismissal as to its claims against defendant Tire America which had joined in defendant UGTC's present motions. The only remaining claims, therefore, are those between plaintiffs Robert and Barbara Harrell and defendant UGTC.

II

Background of The Case

This suit arises out of a distribution agreement between Crawford Tire (Crawford) and UGTC. Crawford, a retail tire dealership, purchased tires from UGTC for resale. Crawford filed this antitrust claim against defendant UGTC alleging that UGTC had discriminated against plaintiffs in violation of the Robinson-Patman Act by selling tires to Crawford at a higher price than to certain of Crawford's competitors. In 1987 Crawford filed a liquidating petition in bankruptcy. Crawford's trustee settled all of Crawford's claims against defendant UGTC, and the settlement was approved by the bankruptcy court. All of Crawford's claims were dismissed with prejudice. The only remaining claims are those of the Harrells. Robert Harrell was the operator, owner and sole shareholder of Crawford, and both Robert and Barbara Harrell were the lessors of the premises formerly leased by Crawford Tire.

III

Motion for Summary Judgment for Lack of Standing

Rule 56(c) of the Federal Rules of Civil Procedure mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

At the summary judgment stage, the court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The existence of a factual dispute between the parties will defeat an otherwise properly supported motion for summary judgment

only if there is a "genuine" issue of "material" fact. *Id.* 477 U.S. at 248.

IV

In the present case, the court concludes that plaintiffs have failed to establish the existence of standing, an element essential to that case. The Harrells' claim fails because they are not the proper parties to assert an antitrust violation. Accordingly, UGTC is entitled to judgment as a matter of law.

The Robinson-Patman Act prohibits sellers from discriminating in price between different purchasers of a product in order to give one a competitive advantage. The language of section 4 of the Clayton Act defines an extremely broad class of persons who may bring a private action for treble damages under the antitrust laws. It provides a cause of action to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15. This sweeping provision has not been accorded the expansive breadth that its language appears to imply. "While acknowledging that the lack of restrictive terms in this provision 'reflects Congress's expansive remedial purpose,'" (citations omitted), the Supreme Court has declined to read the statute as broadly as its language would allow. *Gregory Marketing Corp. v. Wakefern Food Corp.*, 787 F.2d 92, 94 (3rd Cir.), *cert denied*, 479 U.S. 821 (1986). See *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983).

A

Standing As Lessors of The Premises

The United States Court of Appeals for the Third Circuit analyzed the limitations imposed by the United States Supreme Court on suits arising under this statute. *Gregory*, 787 F.2d at 94-95. Two categories of limitations exist: those cases that are unduly difficult to

try because they raise the risk of "multiple treble damage recovery" or complex damage theories and those cases where the alleged antitrust injury is "too remote from the alleged violation" to justify allowing treble damages. *Id.* (discussing *Blue Shield of Virginia, Inc. v. McCready*, 457 U.S. 465 (1982); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Hawaii v. Standard Oil*, 405 U.S. 251 (1972)).

Damages Are Duplicative

Under the limitations imposed by the first category identified above, plaintiffs' claim must fail because it raises the risk of duplicative damage recoveries. The United States Court of Appeals for the Third Circuit, referring to the United States Supreme Court decision *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), stated that

> the [Supreme] Court ruled that an indirect purchaser in a chain of distribution may not maintain a damage action against a seller for overcharges in violation of the Sherman Act passed on by the direct purchaser. Allowing every person along a chain of distribution to claim damages for a single transaction would risk duplicative recoveries. . . . Accordingly, the Court reasoned, to allow such suits would be "inconsistent with the broader remedial purpose of the antitrust laws." (citation omitted)

Gregory, 787 F.2d at 94.

Robert and Barbara Harrell, as lessors of the premises formerly leased by Crawford Tire, can be analogized to indirect purchasers whose damage claims would be duplicative of the claims asserted by Crawford. If Crawford had been made whole by the recovery of damages after its alleged antitrust injury, the damages, even before trebling, would have enabled it to pay the rent due the Harrells, and they, as lessors, would have suffered no harm. The injury they allege is that which

has already been suffered by Crawford and which, in turn, prevented Crawford from paying its rent. In essence, the Harrells seek to be subrogated to the claims of Crawford Tire. Any claim that the Harrells attempt to assert is wholly derivative of the Crawford claim against UGTC which has been settled; it is, therefore, duplicative and not recoverable under the limitations established under the rationale of *Illinois Brick*, 431 U.S. 720 (1977).

Wrong Type Of Party and Injury

Under the limitations imposed by the second category discussed above, plaintiffs' claim again must fail because the Harrells are not in a category of persons contemplated by Congress to be protected by the antitrust laws. They are neither competitors nor consumers in the relevant market of tire sales, and "thus [are] not 'within the area of the economy . . . endangered by the breakdown of competitive conditions.' ". *Gregory*, 787 F.2d at 95 (quoting *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 481 (1982)).

Furthermore, the Harrells' claim must fail because the nature of their harm is beyond the scope of the intended reach of the antitrust laws. As the United States Supreme Court stated in *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983):

> "An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but 'despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable.' [*Illinois Brick Co. v. Illinois*, 431 U.S.], at 760 (Brennan, J., Dissenting). It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages

for the injury to his business or property." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 476-477 (1982).

Id. 459 U.S. at 534-535.

The Harrells' injury is merely tangentially related to an alleged antitrust violation; it is not an antitrust injury for which redress was intended by Congress under the Robinson-Patman Act. Plaintiffs claim as their injury their "lost rent and the lost value of the building (the difference between its value as a retail tire establishment, the purpose for which it was specifically designed, and its value as a general purpose retail or commercial establishment)." (Response of Plaintiffs to Defendants' Motion To Dismiss at 6, filed January 9, 1989.) However, they were not engaged in a business directly affected by the alleged anticompetitive conduct of UGTC. At most, the Harrells lost a tenant which became unable to pay its rent due to that conduct. The Crawords-Harrells (sic) may not claim as their own the antitrust injury that Crawford allegedly suffered. The injury they claim to have suffered was too remote.

Summary

In sum, the injury suffered by the Harrells in their capacity as landlords fails to satisfy the required elements of antitrust standing (a) because the claim asserted by the Harrells is duplicative, and (b) because the Harrells are neither competitors nor consumers in the relevant market in which the alleged antitrust violations occurred, and their alleged injury is, therefore, remote and beyond the scope of relief intended by Congress.

B

Standing As Shareholders of Crawford Tire

In its motion for summary judgment, defendant also asserts that the Harrells lack standing in their capacity as shareholders of Crawford Tire to assert an antitrust

violation.[2] Plaintiff Robert Harrell does not allege that the price discrimination was directed at him individually as the shareholder or owner of Crawford. The harm alleged in the complaint refers only to that which was directed at, and sustained by, Crawford Tire, the retail distributor. Any harm to Mr. Harrell, therefore, flowed derivatively from injuries suffered by Crawford Tire. *Pitchford v. Pepi. Inc.*, 531 F.2d 92, 97 (3rd Cir.), *cert denied*, 426 U.S. 935 (1976). In *Pitchford*, the United States Court of Appeals for the Third Circuit denied plaintiff standing to assert a claim under the antitrust laws in his capacity as both a shareholder and corporate officer.

> This court has adopted the precept that "the language [in section 4 of the Clayton Act) does not include indirect harm that the individual may (have suffered) as a stockholder through injury inflicted upon the corporation." (footnote omitted)

Id. at 97.

The antitrust violation that plaintiff complains of — discriminatory pricing of tires — indisputably was directed at Crawford, the corporation engaged in the business of dealing tires. Mr. Harrell, in his capacity as shareholder, is without standing to assert a claim under the Robinson-Patman claim Act (sic)[3]

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2. Although defendant asserts that plaintiffs have conceded this point because they did not specifically address it in their Response to Defendant's Motion To Dismiss, the court will, nevertheless, address the issue.

3. See *Associated General Contractors v. Carpenters*, 459 U.S. 519 (1983) which examined federal judges' construction of the statutory language of § 7 of the Sherman Act in order to glean the intended breadth of the language in § 4 of the Clayton Act. The United States Supreme Court stated that

> in 1910 the Court of Appeals for the Third Circuit held as a matter of law that neither a creditor nor a stockholder of a corporation that was injured by a violation of the antitrust laws could recover treble damages under § 7. *Loeb v. Eastman Kodak Co.*, 183 F. 704. The court explained that the plaintiff's

Because plaintiffs lack standing, as both lessors of the premises occupied by Crawford Tire and shareholders of the corporation, to assert a claim under the Robinson-Patman Act, defendant's motion for summary judgment shall be granted.

IV

Motion To Dismiss Fraud Claim and Motion To Amend Complaint

We turn to the issues which must be addressed in relation to defendant's motion to dismiss the fraud claim and plaintiffs' motion for leave to amend their complaint to assert properly a claim of common law fraud.[4]

Plaintiffs' claim of fraud is before the court on the basis of pendent jurisdiction. (Complaint, ¶ No. 2, filed April 10, 1987.) Because the court has granted summary judgment in favor of defendant on the antitrust claim there is no longer a federal cause of action to which plaintiffs can pend their state fraud claim. Indeed, it is within the discretion of the trial judge either to retain jurisdiction over the pendent claim or dismiss it for lack of subject matter jurisdiction. *Carnegie-Mellon University, et al. v. Cohill, Judge, U.S. District Court for the W.D. of Pa., et al.*, 484 U.S. 343 (1988). Here, the court will exercise its discretion to dismiss plaintiffs' fraud claim and, for this reason, the Harrell plaintiffs would be required to amend their complaint to allege diversity jurisdiction under 28 U.S.C. § 1332 in order to maintain jurisdiction in this court.

The court, however, is not inclined to permit an amendment to the complaint because the claim for fraud

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injury as a stockholder was "indirect, remote, and consequential." *Id.* at 709. (footnote omitted)

Id. at 533-534.

4. Plaintiffs' proposed amended complaint continues to allege an antitrust claim. For the reasons stated in Part IV, *supra*, plaintiffs' motion for leave to amend its complaint to assert a Robinson-Patman claim will be denied.

asserted in the proposed second amended complaint does not allege a claim upon which relief can be granted to either, or both, of the Harrells. The amended complaint states a cause of action for fraudulent misrepresentation only by Crawford whose claims have been settled. The court may deny leave to amend where the amended complaint is futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

The elements of fraudulent misrepresentation are:

> (1) A misrepresentation.
> (2) A fraudulent utterance.
> (3) An intention by the maker that the recipient will be induced to act.
> (4) Justifiable reliance by the recipient on the misrepresentation.
> (5) Damage to the recipient as the proximate result.

Michelson v. Exxon Research & Engineering, 629 F.Supp. 418, 423-24 (W.D. Pa. 1986), *aff'd*, 808 F.2d 1005 (3rd Cir. 1987). A claim for fraudulent misrepresentation is available to those who receive misrepresentations and rely on such misrepresentations to their detriment. *Id.*

Defendant agrees that the Harrells were not the recipients of the alleged misrepresentations; that Crawford Tire was; that the Harrells, as a matter of law, could not have "justifiably relied" on the misrepresentations and that they have no standing to assert this cause of action. *Michelson*, 629 F.Supp. at 424 (plaintiff denied standing to bring claim for fraudulent misrepresentation because employer Exxon, not he, was the recipient of the misrepresentation).

Plaintiffs rely on the case of *Moffatt Enterprises Inc. v. Borden Inc.*, 807 F.2d 1169 (3rd Cir. 1986) to support their contention of standing. The *Moffatt* court allowed individual corporate officers, as well as the corporation itself, to claim fraudulent misrepresentation. In *Moffatt*,

the individual plaintiffs had an on-going business relationship with the defendant before the corporation was formed. Indeed, it was defendant's misrepresentations that induced the individual plaintiffs to incorporate the plaintiff corporation in the first place, and the loss incurred by the individual *Moffatt* plaintiffs involved, largely, the costs related to the organization of the corporate plaintiff.

In the present case, Crawford Tire existed at the time the alleged misrepresentations occurred. The alleged misrepresentations made by UGTC were directed to the corporation, Crawford Tire, and not to either Harrell plaintiff in an individual capacity. The fact that Robert Harrell, an officer of the corporation, was privy to the representations allegedly made by UGTC and the fact that he may have acted as a result, does not give him standing to bring a claim for fraudulent misrepresentation, because he, as an individual, was not the intended recipient. Based on the allegations of their amended complaint, only Crawford could be deemed to have detrimentally relied on the information provided by UGTC. Plaintiffs' motion for leave to amend its complaint will, therefore, be denied.

An order follows.